respondent and Arul Chandran. She alleged that the respondent in collusion with Joginder Singh had unlawfully transferred the said property to him and later in collusion with Arul Chandran unlawfully transferred it to him. She alleged breach of contract and/or undue influence and/or fraud on her. She asked for a declaration that the transfers were null and void and for damages. After trial, the High Court gave judgment for her and awarded damages to her [see [1983] 2 M.L.J. 127 and [1984] 1 M.L.J. 175]. Joginder Singh, the respondent and Arul Chandran appealed to the Federal Court. That appeal was dismissed [see [1983] 2 M.L.J. 196]. The High Court and the Federal Court were at one in holding that Joginder Singh and the respondent were guilty of fraud in that they falsely represented to Tara that the transaction of 30 March 1974 was of the nature of a security such as would enable her to redeem the property by repaying the sum of $220,000 at any time, when it was in fact an outright sale, and further they falsely represented that it was their intention to give effect to the transaction as a security transaction, when in fact they had no intention of allowing Tara to redeem the property at any time. Both courts found that Tara had been induced by those representations to enter into the transaction. Then Joginder Singh, the respondent and Arul Chandran appealed to the Privy Council. The Privy Council dismissed the appeal against the finding of fraud against Joginder Singh and the respondent [see [1986] 1 M.L.J. 105]. By consent, the appeal against Arul Chandran was allowed upon agreed terms, one of which was that all allegations of fraud against him were withdrawn.

It appears that when the respondent obtained from the appellant the cheque dated 25 March 1975 for the sum of $149,520, they meant it to be a form of security for the respondent to recover the money which he was to supply for payment to the Hongkong and Shanghai Bank of the amount due from the appellant to the bank under guarantee by Joginder Singh. Tara's said property was also given by her as security partly for that same money which was to be supplied by the respondent for that purpose. Therefore when the respondent got the said property transferred to himself, the result was that what was due from him in respect of the money which he had supplied was fully satisfied. It is immaterial that the respondent had resorted to an improper method in getting the property transferred to himself. The fact remains that at the time when it was transferred to him, it was a security as intended by Tara. Since the judgment which the respondent had obtained from the Singapore High Court was also in respect of the same money which he had supplied, the satisfaction subsequent to the judgment, by way of the transfer of the property, also became a satisfaction of the judgment. When that judgment was registered in the Johor Bahru High Court on 16 September 1975, it had already been wholly satisfied by the registration on 22 July 1975 of the transfer of the said property to the respondent, and therefore in view of section 4(1)(a) of the Act it has been registered in contravention of the Act and under section 5(1) the registration of the judgment should be set aside, and we order accordingly. In our judgment, it was wrong for the judge to decline to consider the question of satisfaction of the judgment and to direct the appellant to apply to the High Court in Singapore to set it aside. There is nothing to show that it was an irregular judgment so as to justify its being set aside.

This appeal is allowed with costs here and in the court below. The deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Syarikat George Puthucheary.*

CHIP YEW BRICK WORKS SDN. BHD. v. CHANG HEER ENTERPRISE SDN. BHD.

[S.C. (Salleh Abas L.P., Mohamed Azmi & Wan Hamzah S.C.JJ.) 22 March & 25 May 1988]

[Johor Bahru – Supreme Court Civil Appeal No. 267 of 1987]

Companies and Corporations – Petition for winding up – Neglect to pay debt – Application for injunction to restrain petitioner from advertising petition – Part of debt admitted – Application dismissed – Companies Act 1965, ss. 218(1)(e) & 218(2)(a).

In this case, the appellant had served a notice on the respondent company demanding payment of a sum of $127,159 and notifying that action for the winding up of the respondent company would be taken in the event that payment was not made within the stated time. The sum was for the cost of bricks supplied. No payment was made and the appellant filed a petition for winding up. The respondent company then applied for an injunction to restrain the appellant from advertising the petition and this was

granted by the High Court. The appellant appealed. It appeared that the respondent company disputed the appellant's claim but admitted that it owed the appellant a sum of $60,580.

Held, allowing the appeal: (1) the amount of the admitted and unpaid debt was substantial and therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order winding up or not;

(2) the evidence so far placed before the court did not establish that the purpose of the appellant in bringing the petition was to put pressure on the respondent company and thereby to induce it to pay a sum which was not due and owing and to cause irreparable damage to the respondent company by advertisement of the petition;

(3) the Companies (Winding up) Rules 1972 require that every petition should be advertised and it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. Even if the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising.

Cases referred to:

(1) *Re Welsh Brick Industries Ltd.* [1946] 2 All E.R. 197 (cited).
(2) *In re a Company* [1894] 2 Ch. 349 (cited).

SUPREME COURT.

Ong Ban Chai for the appellant.

Serene S. Ong for the respondent.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the judgment of the court): The appellant served on the respondent company a notice under the Companies Act 1965 ("the Act") demanding payment of a sum of $127,159 and notifying that action for the winding up of the respondent company would be taken in the event that payment is not made within the stated time. The sum was for the cost of bricks supplied. The respondent company did not pay any part of the amount claimed. Eventually, the appellant filed a petition for winding up. But on the application of the respondent company, the High Court granted an injunction restraining the appellant from advertising the petition. This appeal was brought against the grant of the injunction.

The learned High Court judge stated his ground for granting the injunction as follows:

"The letter 'J' dated 30 September 1986 (of the respondent company) in response to the statutory notice disputed the petitioner's claim of $127,159 as being the outstanding balance of the purchase price of bricks sold and delivered and requested for full particulars. There was no response to all these letters, by the petitioner. In the light of these letters and the absence of any response on the part of the petitioner, I agreed that there was a *bona fide* dispute of the exact amount owing and that the respondent had not neglected the statutory notice of demand ..."

Therefore the learned judge held that the respondent company was not caught under sections 218(1)(e) and 218(2)(a) of the Act, which read as follows:

"218.(1) The court may order the winding up if –

(e) the company is unable to pay its debts;

(2) A company shall be deemed to be unable to pay its debts if –

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor."

The learned judge agreed with the respondent company that advertising the petition would cause irreparable damage to it as an ongoing concern.

Although in the letter "J" referred to by the learned judge the respondent company disputed the appellant's claim for $127,159, in its affidavits in support of its application for injunction the respondent company admitted that it owed the appellant a sum of $60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of $60,580 is not disputed the respondent company is caught under section 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made, the respondent company can still defend on the balance amount in dispute. Under the Act, the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is

disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd.*[1]

For the respondent company, the case of *In re A Company*[2] was cited to us. In that case, it was held that where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it. It was contended that the purpose of the appellant in bringing the present petition was to put pressure on the respondent company and thereby to induce it to pay a sum which is not due and owing, and to cause irreparable damage to the respondent company by advertisement of the petition. We find that the evidence so far placed before the court does not establish this.

The only other ground of the respondent company to support its application for an injunction is to be found in its effort to show that it is solvent. It produced the balance sheet, the trading, contract, profit and loss account, a list of debtors and the amounts of their debts, and a list of creditors and the amounts due from them. All of these documents show the positions as at 30 November 1986 and on the basis of these documents it was contended that the balance after the amount of debts owing to the respondent company is reduced by the debts owed by it was $451,690.15 in favour of the respondent company. In our judgment this matter, if relevant at all, is a matter properly to be considered at the hearing of the petition, and it is premature to consider it at this stage. The Companies (Winding Up) Rules 1972 require that every petition shall be advertised, and in our opinion it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. If the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising.

We order that the injunction be set aside. The appeal is allowed with costs here and in the High Court. The deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Ong Ban Chai & Co.; L.M. Ong & Co.*

LIAN KEOW SDN. BHD. (IN LIQUIDATION) & ANOR. v. OVERSEAS CREDIT FINANCE (M) SDN. BHD. & ORS.

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 30 November, 1, 2, 3, 4, 7, 8 & 9 December 1987 & 7 May 1988]

[Kuala Lumpur — Supreme Court Civil Appeal No. 58 of 1986]

Companies and Corporations — Winding up — Transfers, charges and sales of land before and after commencement of winding up — Whether transfers void — Whether transfers can be validated — Claim against company director for breach of fiduciary duty — Companies Act 1965, ss. 108, 223, 229 & 293.

Companies and Corporations — "Created" — "Property" — Meanings of — Companies Act 1965, ss. 108(1) & 293(1).

Bankruptcy — Transfers, charges and sales of land before and after commencement of winding up of company — Validity of transactions — Whether bankruptcy rules as to fraudulent preference apply to winding up of company — Whether transfers void — Whether transfers can be validated — Claim by liquidator — Bankruptcy Act 1967, ss. 53 & 53B.

Bankruptcy — "Property" — "Any person" — "A person unable to pay his debts as they became due from his own money" — "Within six months after the making of the transfers" — "In favour of any creditor" — Meanings of — Bankruptcy Act 1967, s. 53(1).

Land Law — Transfers, charges and sales of land before and after commencement of winding up of company — Whether transactions valid — Transfers registered — Whether transfers can be set aside — Application of equitable principles — Whether equitable doctrine of constructive fraud applicable — National Land Code 1965, ss. 206, 320 & 342.

In this case, the first appellant (the first plaintiff in the trial court) is a local company limited by shares and is in liquidation. Upon a petition by the Government of Malaysia presented on 13 November 1978, the appellant company was ordered to be wound up under the provisions of the Companies Act 1965. The Official Receiver, the second appellant, was constituted provisional liquidator of the affairs of the company. The case concerned three portions of a piece of rubber estate measuring a total of 893 acres